10-20445

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CITIGROUP, INC.,

Plaintiff-Appellant,

v.

NATIONAL UNION FIRE INSURANCE CO., ET AL.,

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFF-APPELLANT

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders is a non-profit 501(c) (3) consumer organization founded in 1991 that has nineteen years of experience helping solve insurance problems and advocating for fairness in insurance transactions. Donations, foundation grants and volunteer labor fuel the organization. United Policyholders' Board of Directors includes the former Chief Justice of the Arizona Supreme Trial court and the former Washington State Insurance Commissioner.

United Policyholders' work is divided into three program areas: *Roadmap to Recovery* provides tools and resources that help individuals and businesses solve insurance problems that can arise after an accident, illness, disaster, or other adverse event. The *Roadmap to Preparedness* program promotes insurance and financial literacy as well as disaster preparedness. The *Advocacy and Action* program advances policyholders' interests in trial courts of law, legislative and public policy forums, and in the media. United Policyholders participates in the proceedings of the National Association of Insurance Commissioners as an official consumer representative. United Policyholders offers an extensive library of publications, legal briefs, sample policies, forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.unitedpolicyholders.org.

In addition to serving as a resource on insurance claims for individuals and commercial policyholders, United Policyholders monitors legal and marketplace developments affecting the interests of all policyholders. United Policyholders receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory oversight proceedings.

Since 1992, United Policyholders has filed more than 280 *amicus curiae* briefs on behalf of policyholders in trial courts throughout the United States.[1] Moreover, United Policyholders has filed *amicus curiae* briefs in numerous cases before United States Supreme Trial court.[2] Indeed, the U.S. Supreme Trial court cited United Policyholders' *amicus curiae* in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999). United Policyholders was the only national

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[1] See e.g., *Pincheira v. Allstate Ins. Co., Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London*, 449 Mass. 621 (2007); *Vandenberg v. Superior Trial court*, 88 Cal. Rptr. 2d 366 (Cal. 1999); *Allstate Ins. Co. v. Gregory Serio*, No. 97 CIV-0670 (RCC), United States District Trial court, Southern New York District; Knotts v. Zurich Ins. Co., 197 S.W.3d 512 (Ky. 2006); *Advance Watch Co., v. Kemper Nat'l Ins. Co.*, 99 F.3d 795 (6th Cir. 1996); *Aircraft Holdings, LLC v. XL Specialty Ins. Co.*, 935 So.2d 1219 (Fla. 2006); *SCI Liquidating Corp. v. Hartford Ins. Co.*, 272 Ga. 293 (2000); *Pilkington N. Am. v. Travelers*, 106 Ohio. St. 3d 1451 (Ohio 2005); *Excess Underwriters Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42 (2004)

[2] See, e.g., *Fuller-Austin Insulation Co., v. Highlands Ins. Co.*, 549 U.S. 946 (2006); *Philip Morris USA v. Mayola Williams*, 547 U.S. 1162 (2006); *Aetna Health, Inc. v. Juan Davila*, 542 U.S. 200 (2004); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Rush Prudential HMO v. Debra Moran*, 533 U.S. 948 (2001); *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999).

consumer organization to submit an amicus curiae brief in the landmark case of *State Farm v. Campbell*, 538 U.S. 408 (2003).

In addition, United Policyholders has been giving information and recovery support to Texas businesses and individuals who've suffered losses due to tropical storms, hurricanes, hailstorms and other catastrophic events. UP is currently coordinating with the Texas Public Insurance Counsel's office to promote sound public policy on insurance matters that impact Texans.

United Policyholders has a vital interest in ensuring that insurance companies fulfill the promises they make to their policyholders. While insurance companies are in business to earn profit through risk assumption, businesses and individuals rely on insurance to protect property and livelihoods. United Policyholders seeks to prevent insurance companies from shifting risk back to policyholders through schemes that are not authorized by insurance contracts or public policy. The organization works to counterbalance the widely-represented interests of insurance companies by serving as an advocate for large and small policyholders in forums throughout the country.

In the case at bar, United Policyholders seeks to appear as *amicus curiae* to address a certain question before the Trial court that is of significance well beyond the application of law to the specific facts of this litigation. This important issue will affect policyholders nationwide. All of the legal research and

writing in this brief has been performed by unpaid volunteer counsel, and no party to this appeal participated in the drafting of this brief or funded this work.

II. QUESTION PRESENTED

Whether an excess insurance carrier's denial of coverage to a policyholder who settles with its primary insurance company for an amount below the primary insurance company's limits violates the public policy favoring settlements.

III. SUMMARY OF ARGUMENT

The trial court's decision is contrary to the purpose of insurance and against public policy insofar as it permits an excess insurance company to disclaim coverage following a policyholder's settlement with a primary insurance company and thereby effectively grants the excess insurance company a unilateral right to prevent the policyholder from settling with a primary insurance company.

The purpose of insurance is to transfer risk. In exchange for a premium, the parties agree to transfer the policyholder's risk of loss beyond the primary policy limits to the excess insurance company. This trial court's decision undermines the very purpose of insurance because it shifts the risks inherent in litigation and coverage decisions back onto the policyholder's shoulders—the policyholder is forced to litigate a complicated underlying insurance dispute to an unpredictable end. A policyholder's exposure to liability and financial risks

actually increases under this ruling in the form of increased litigation expenses, higher settlement costs, and longer delay in resolution of coverage issues. Far from realizing insurance benefits, the policyholder is in a worse position than it would have been in if there had been no insurance policy. In addition, the trial court's decision is contrary to clear federal public policy favoring settlements and will lead to the judicial system becoming log jammed with cases that otherwise might have been settled.

IV. ARGUMENT

A. THE PURPOSE OF INSURANCE IS TO INSURE.

The first and fundamental rule is that the purpose of insurance is to insure. Insurance is a means of risk transference whereby a policyholder transfers the risk of loss or the responsibility for certain costs and expenses to an insurance company in exchange for payment of a premium.[3] American industry today faces many business threatening disasters. In dealing with such catastrophes—natural and man made—businesses turn to insurance companies to save the day – and save their businesses. Liability insurance is purchased by virtually every business organization in the United States as protection. It covers a broad range of claims resulting from real or imagined bodily injury or property damage or financial crises. In addition, although the main objective of an insurance policy is to transfer

[3] Alan I. Widiss, *Insurance Law*, at 11 (1988).

the risk of a specified loss, an incidental benefit a policyholder obtains by shifting the risk of loss is to avoid sustaining further losses which might result in the absence of insurance, such as a forced sale of assets to meet the liability arising from a loss.[4]

Insurance is an agreement whereby parties give valuable consideration for protection from and indemnification against loss, damage, injury, or liability. The rights and duties of the parties to the insurance contract are set forth in the insurance policy. Unlike a regular contract however, to a policyholder, an insurance policy is not a widget and it is not simply a contract to pay money. It is a product. It is peace of mind and an expectation that the policyholder is protected. It is an obligation backed by a fiduciary duty and a duty of good faith by the insurance company which sold the policyholder the insurance coverage. It is the very nature of the insurance contract that payment is to be made automatically without the need for a lawsuit. As one trial court summarized it:

> The benefit contracted for by an insured under the terms of a policy is the availability of money promptly upon the occurrence of a particular event. When an insurer refuses unreasonably to make a payment of the benefit due, or when the insurer does not pay promptly, it deprives the insured of the essence of the bargain. The insured bargained for prompt payment not a right of action against the insurer.

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[4] *Id.*

Kanne v. Connecticut Gen. Life Ins. Co., 607 F. Supp. 899, 907 (C.D. Cal. 1985), *aff'd in part and rev'd in part*, 819 F.2d 204 (9th Cir. 1986), *op. withdrawn, reh'g granted*, 823 F.2d 284 (9th Cir. 1987), *vacated*, 859 F.2d 96 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989).

For the policyholder to derive the benefit of the insurance bargain, the insurance company must protect the policyholder's interests above its own. As servants of the public, insurance companies are held to the universally high standard of 'good faith.'[5] Insurance companies recognize that "[g]ood conscience and fair dealing require that the insurer not pursue a course which is advantageous to itself while disadvantageous to its policyholder."[6] If the insurer is motivated by selfish purpose or by the desire to protect its own interests at the expense of its insured's interest, bad faith exists, even though the insurer's actions were not actually dishonest or fraudulent.[7]

The policyholder purchases an insurance policy, pays premiums up front and expects insurance coverage when a claim is made. The policyholder does not expect its insurance company to be motivated by a selfish desire to protect

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[5] Plaintiff's Memorandum of Law For Trial, at 1 (filed Sept. 11, 1990), *Continental Cas. Co. v. Great Am. Ins. Co.*, No. 86-C-3938, 1990 U.S. Dist. Lexis 12807 (N.D. Ill. Sept. 28, 1990).

[6] Appellant's Reply Brief at 20, *Century Indem. Co. v. Truck Ins. Exch. of the Farmers Ins. Group*, 887 P.2d 455 (Wash. Ct. App. 1995) (No. 13141-6-III).

[7] Plaintiff's Memorandum of Law For Trial, at 1 (filed Sept. 11, 1990), *Continental Cas. Co. v. Great Am. Ins. Co.*, No. 86-C-3938, 1990 U.S. Dist. Lexis 12807 (N.D. Ill. Sept. 28, 1990).

its own interests. It is clear in this case that the excess carriers did not seek to protect their policyholder's interests above their own. Instead, the excess carriers chose to punish the policyholder for settling with the primary insurance company by denying coverage on the basis of that settlement, even though such a position contravenes both public policy and the purpose of insurance.

B. FORCING THE POLICYHOLDER TO LITIGATE WITH THE PRIMARY INSURANCE COMPANY IN EFFECT PUNISHES THE POLICYHOLDER AND FORCES IT TO BEAR UNNECESSARY COSTS

Forcing the policyholder to litigate with the primary insurance company results in unnecessary costs to the policyholder which were not part of the insurance transaction. As stated in Steven McG. Bundy's article, *The Policy in Favor of Settlement in an Adversary System*, a simple example of the way settlements increase efficiency and reduce costs is illustrative:

> Imagine a case resolved by adjudication in which the tribunal will hand down the correct result, but without taking account of the parties' costs. In a personal injury suit, for example, the jury might award $10,000, by coincidence the precise amount that plaintiff deserves as compensation and the precise amount required to deter the defendant. But if further litigation to achieve that result will cost each party $1,000, then plaintiff will be undercompensated and defendant overdeterred. Settlement for the amount of the judgment would produce a more just outcome by allowing the parties to avoid these costs.[8]

[8] Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 Hastings L.J., 1, 3-4 (1992); Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (Supp. IV 1992).

Applying this concept to insurance recovery litigation, where much larger amounts may be involved, the amounts spent increase exponentially.

1. POLICYHOLDERS ARE IN AN UNFAVORABLE POSITION WHEN LITIGATING WITH AN INSURANCE COMPANY

The importance of considering the expenses of a litigant is especially true in the realm of insurance coverage disputes, because insurance companies are in the business of analyzing and absorbing risk and "the bargaining power of an insurance carrier vis-à-vis the bargaining power of the policyholder is disparate in the extreme." *Hayseeds, Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73, 77 (W. Va. 1986); *Miller v. Fluharty*, 500 S.E. 2d 310, 318, n.10 (W. Va. 1997) (noting that the disparity of bargaining power between an insurance company and its policyholder "is apparent in the fact that insurance companies spend over $1 billion annually in litigation battles against policyholders") (citing Eugene R. Anderson & Joshua Gold, *Recoverability of Corporate Counsel Fees in Insurance Coverage Disputes*, 20 Am. J. Tr. Adv. 1, 3 n.5 (1996)).

An insurance company is a financial colossus with unmatched resources and expertise in insurance coverage litigation.[9] In contrast, after a

[9] *THE FACT BOOK 1998: Property/Casualty Insurance Facts* 5 Insurance Information Institute (1998) (the insurance industry "[a]ltogether . . . has responsibility for assets totaling $3.1 trillion at the end of 1996. The property/casualty segment of the business is responsible for assets totaling $802.3 billion at the close of 1996"). *See also*, "A World View Of

footnote continued

policyholder suffers a loss it is in a vulnerable position. Once a policyholder files a claim with its insurance company it is even more vulnerable. When a policyholder gives notice of a major loss and the insurance company denies that it owes the policyholder coverage, only the insurance company is adequately prepared for the ensuing coverage dispute. Coverage issues are generally not clear cut, or drawn clearly in black and white, and as such, coverage disputes require retention of coverage counsel and experts, and consume vast amounts of time and money. With superior resources, claims experience and litigation expertise, the balance of power is overwhelmingly tilted toward the insurance company. The Courts should encourage insurance companies to make reasonable coverage decisions and force full resolution of disputes at settlement, rather then foster a situation where the policyholder is always on the defensive against its own insurance company, reassuming the risk it thought it had transferred.

Unfortunately, exploiting policyholders' financial vulnerability can be a lucrative business. First, insurance companies earn investment income--a profit--during an insurance coverage dispute with a policyholder. This is done by continuing to invest the policyholder's premiums and the reserves for the duration of the dispute. Second, insurance companies are bulk purchasers of legal services;

Insurance Insolvency Regulation III," H. Subcomm., 103 Cong. (Comm. Print 1994) (describing insurance as "a $2.3 trillion financial industry....").

they incur proportionately lower litigation costs than their policyholders, and can reuse work product from case to case. In stark contrast to the typical policyholder's experience, litigation is the bread and butter of insurance companies. In large part, litigation is their business. Insurance companies have admitted that they are waging a "war" against policyholders.[10] In this "war," insurance companies are "institutional litigants." Insurance companies boast that they have filed "tens of thousands of briefs across the country in a number of trial courts and in a vast variety of contents" against their policyholders.[11] According to the former president of the Alliance of American Insurers, "[t]he liability system is fuel for the insurance engine."[12] Claims exceeding $10 million are seldom resolved without litigation.[13] In fact, the insurance industry admits that it spends over $1 billion a year battling their policyholders in trial court.[14]

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[10] Memorandum of Law of CNA in Support of Motion To Strike Amended Counterclaims, Cross-Claims and Third-Party Complaint of General Battery, at 1, *Continental Cas. Co. v. General Battery Corp.*, No. 93C-11-008, 1994 WL 682320 (Del. Super. Nov. 16, 1994). The CNA Insurance Group is comprised of approximately forty-seven insurance companies. *See* Best's Insurance Reports: Property-Casualty United States (1997 ed.).

[11] Brief and Appendix of *Amicus Curiae* Insurance Environmental Litigation Association (IELA) in Support of Continental Insurance Company, Aetna Casualty and Surety Company and Fireman's Fund Insurance Company of Newark, N.J., at 25, n.21, *County of Columbia v. Continental Ins. Co.*, 595 N.Y.S.2d 988 (App. Div. 3d Dep't 1993) (No. 65588).

[12] Franklin Nutter, *Search for Stability: Industry Must Solve Problems that Undermine a Stable Market*, Bus. Inc., June 17, 1985, at 21).

[13] Richard A. Archer, *Preparing For A 'Mega-Loss'*, Bus. Ins., Oct. 10, 1994, at 23. Mr. Archer is the retired deputy chairman of Jardine Insurance Brokers, Inc. <u>See also</u> L. Brenner, *The Polluted Open Box*, Corp. Fin., June/July 1995 at 34, 35 ("No matter what the policy

footnote continued

These factors, combined with the insurance industry's tremendous collective resources and litigation experience, allow insurance companies to wage wars of attrition against policyholders who litigate an insurance dispute once in a lifetime.[15] Insurance companies' litigation abilities, when combined with policyholders' financial vulnerability, virtually guarantee an insurance company victory against an aggrieved policyholder.

C. THE RESULT IN CITIGROUP IS CONTRARY TO PUBLIC POLICY WHICH FAVORS SETTLEMENT

The trial court's ruling violates public policy in that it encourages unnecessary litigation between the policyholder and the primary insurance company, and ignores the benefits and importance of encouraging settlements. In fact, the Federal Government and judicial system encourages the public policy favoring settlement in its rules and regulations.

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language, if there's a significant seven-digit claim, it's not going to be covered [by the policyholder's insurance company]."); See also Eugene R. Anderson, et al., I*nsurance Nullification By Litigation*, Risk Mgmt., Apr. 1994, at 46).

[14] Brief of *Amicus Curiae* American Ins. Assoc. at 3, *Affiliated FM Ins. Co. v. Constitution Reinsurance Corp.*, 626 N.E.2d 878 (Mass. 1994) (No. SJC-06165); Leslie Schism, *Tight-Fisted Insurers Fight Their Customers To Limit Bid Awards*, Wall St. J., Oct. 15, 1996, at A1. Moreover, the $1 billion figure includes only what the insurance industry spends on property and casualty insurance litigation. When life and health insurance litigation expenditures are added, "the legal costs of coverage battles with policyholders may far exceed $1 billion[.]" Robert H. Gettlin, *Fighting The Client*, Best's Rev. P/C, Feb. 1997, at 49, 50).

[15] *See* Eugene R. Anderson, *et al.*, *Insurance Nullification By Litigation*, Risk Mgmt., Apr. 1994, at 46; Eugene R. Anderson, *Is Something Wrong With Claims Handling? Plaintiff: Insurers Profit From Delay Litigation*, Claims (Apr. 1995), at 33.

The various Federal Rules have been created and amended in a way to encourage settlements and enhance judicial efficiency. For example, Rule 16 of the Federal Rules of Civil Procedure, as amended in 1983, now states that one of its purposes is "encouraging settlement."[16] While the primary purpose of the Rule 16 Conference prior to 1983 was "to familiarize the litigants and the trial court with the issues actually involved in a lawsuit so that the parties could accurately appraise their cases and substantially reduce the danger of surprise at trial," it is now "officially recognize[d] that settlement is a legitimate objective that should be fostered during the pretrial conference."[17] Similarly, Rule 68 provides that the judge can impose costs on a plaintiff who refused a settlement offer that turns out more favorable to her than the trial outcome.[18] Multiple trial courts, including the United States Supreme trial court have held that the purpose of Rule 68 is to encourage settlement.[19] It has even been said that Rule 68 "is also intended to

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[16] Fed. R. Civ. P. 16(a)(5); *see* Abraham L. Wickelgren, *No Free Lunch: How Settlement Can Reduce the Legal System's Ability to Induce Efficient Behavior*, bepress Legal Services, Paper 37, 2003, at 6.

[17] Wright & Miller, Federal Practice and Procedure: Pleadings and Motions § 1522 (2010) (emphasis added).

[18] Wickelgren, *No Free Lunch* at 7.

[19] *Id.*, *Marek v. Chesney*, 473 U.S. 1, 5, 105 S.Ct. 3012, 3014 (1985)("[t]he plain purpose of Rule 68 is to encourage settlement and avoid litigation."); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352, 101 S.Ct. 1146, 1150 (1981); *Lyons v. Cunningham*, 583 F.Supp. 1147, 1158 (S.D.N.Y 1983).

protect the party who is willing to settle from the burden of costs which subsequently accrue."[20]

In addition, the Federal Rules of Evidence encourage settlement by preventing any discussion of settlement negotiations from being admitted at trial.[21] Congress has even weighed in on the issue and addressed the importance of settlement and tried to ease the burden that litigation places on the Federal trial court system by passing the Civil Justice Reform Act of 1990. In that measure, Congress required "each federal district trial court to prepare a 'civil justice expense and delay reduction plan.'"[22]

Moreover, this Court has routinely held that public policy favors settlements. *See Deleonardis v. U.S. Dep't of Health and Human Servs.*, 35 F.3d 559, No. 93-2856, 1994 WL 499623, *1 (5th Cir. Aug. 22, 1994) ("Settlement agreements are favored by the courts and should be encouraged and upheld whenever possible."); *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1164 (5th Cir. 1985) ("[P]ublic policy favors voluntary settlements which obviate the need for expensive and time-consuming litigation."); *Ins. Concepts, Inc. v. Western Life*

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[20] *Staffend v. Lake Central Airlines, Inc.*, 47 F.R.D. 218, 219 (N.D. Ohio 1969).

[21] Wickelgren, *No Free Lunch* at 7; Fed. R. Evid. 408 advisory committee's note.

[22] Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 Hastings L.J., 1, 3-4 (1992); Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (Supp. IV 1992).

Ins. Co., 639 F.2d 1108, 1111 (5th Cir. 1981) ("Without a doubt, public policy favors the settlement of claims brought before the courts. 'Settlement agreements have always been a favored means of resolving disputes …') (citations omitted); *United States v. City of Miami*, 614 F.2d 435 (5th Cir. 1981) ("Settlement of lawsuits by agreement has always been favored."), *modified*, 664 F.2d 435 (5th Cir. 1981) (en banc); *Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 428 (5th Cir. 1977) ("Settlement agreements are 'highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits.'") (citation omitted).[23]

Here, if the trial court's decision is allowed to stand, the effect on the judicial system will be in contravention to this very clear federal public policy favoring settlements. If policyholders are unable to settle with primary or underlying insurance companies because it will lead to the loss of their excess coverage, then the courts' dockets will become log jammed with a wave of insurance coverage cases that otherwise might have been resolved through settlement. Similarly, if policyholders are prevented from realizing the benefits of their insurance through settlement, then it will also chill or prevent policyholders'

[23] Texas law provides that provisions of contracts, including insurance policies, are void when they contravene public policy. As such, the validity of any provision of an excess insurance policy that bars settlement should be seriously questioned. *See* 45 Tex. Jur. 3d *Insurance Contracts and Coverag*e § 110 (2010); *Hamaker v. American States Ins. Co. of Texas,*493 S.W.2d 893, 895 (Tex.Civ.App. 1973).

ability to settle the underlying liability cases for which coverage is being sought. Without the availability of the insurance settlement funds, policyholders will be much less likely to settle the underlying liability cases thereby further increasing the number of cases on the courts' dockets, cases that might have otherwise been settled.

V. CONCLUSION

The trial court's decision should be reversed because it is contrary to public policy favoring settlement and will potentially have a devastating effect on the ability of litigants and the judicial system to resolve cases efficiently and economically.

Therefore, for the foregoing reasons, United Policyholders urges that this Court reverse the trial court's decision.

Dated: September 1, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 2010, I caused one original and 6 true and accurate paper copies of the BRIEF FOR AMICUS CURIAE UNITED POLICYHOLDERS and one copy in electronic format, to be served on the Clerk of the Court by Federal Express mail, and I further certify that on the 1st day of September, 2010, one printed copy and one copy in electronic format was served by Federal Express mail upon the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7) and Fifth Circuit Rule 32.3:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contained 2392 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14 point (12 point in footnotes) Times New Roman font.

Dated: September 1, 2010

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